

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID P. TISDALE,

Plaintiff,

v.

BANK OF AMERICA, *et al.*,

Defendants.

Case No. 2:14-cv-00216-LDG (CWH)

ORDER

David Tisdale filed his complaint against the defendants, Bank of America, N.A. and Bayview Loan Servicing, LLC) in state court. The defendants removed this action to this Court on February 10, 2014, and then moved to dismiss (#5) the action on February 17, 2014. Tisdale filed an opposition and a motion for judgment (docketed at #11, 12), and then filed a motion for default judgment (#13). For the reasons explained below, the Court will deny the plaintiff's motions for judgment and will grant the defendants' motion and dismiss this action.

Motion to Dismiss

A motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6), challenges whether the plaintiff's complaint states "a claim upon which relief can be granted." In ruling upon this motion, the court is governed by the relaxed requirement of Rule 8(a)(2) that the

1 complaint need contain only “a short and plain statement of the claim showing that the
2 pleader is entitled to relief.” As summarized by the Supreme Court, a plaintiff must allege
3 sufficient factual matter, accepted as true, “to state a claim to relief that is plausible on its
4 face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Nevertheless, while a
5 complaint “does not need detailed factual allegations, a plaintiff’s obligation to provide the
6 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
7 formulaic recitation of the elements of a cause of action will not do.” *Id.*, at 555 (citations
8 omitted). In deciding whether the factual allegations state a claim, the court accepts those
9 allegations as true, as “Rule 12(b)(6) does not countenance . . . dismissals based on a
10 judge’s disbelief of a complaint’s factual allegations.” *Neitzke v. Williams*, 490 U.S. 319,
11 327 (1989). Further, the court “construe[s] the pleadings in the light most favorable to the
12 nonmoving party.” *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th
13 Cir. 2007).

14 However, bare, conclusory allegations, including legal allegations couched as
15 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. “[T]he tenet
16 that a court must accept as true all of the allegations contained in a complaint is
17 inapplicable to legal conclusions.” *Ashcroft v. Iqbal* 556 U.S. ___, 129 S.Ct. 1937, 1949
18 (2009). “While legal conclusions can provide the framework of a complaint, they must be
19 supported by factual allegations.” *Id.*, at 1950. Thus, this court considers the conclusory
20 statements in a complaint pursuant to their factual context.

21 To be plausible on its face, a claim must be more than merely possible or
22 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
23 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
24 pleader is entitled to relief.’” *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
25 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.

1 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
2 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

3 Although allegations of a *pro se* complaint are held to less stringent standards than
4 formal pleadings drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519 (1972), sweeping
5 conclusory allegations do not suffice, *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

6 Motion for Summary Judgment

7 In considering a motion for summary judgment, the court performs “the threshold
8 inquiry of determining whether there is the need for a trial—whether, in other words, there
9 are any genuine factual issues that properly can be resolved only by a finder of fact
10 because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty*
11 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.
12 2012). To succeed on a motion for summary judgment, the moving party must show (1)
13 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment
14 as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
15 (1986); *Arango*, 670 F.3d at 992.

16 A material fact is one required to prove a basic element of a claim. *Anderson*, 477
17 U.S. at 248. The failure to show a fact essential to one element, however, “necessarily
18 renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. Additionally, “[t]he mere
19 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.”
20 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting
21 *Anderson*, 477 U.S. at 252).

22 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
23 adequate time for discovery and upon motion, against a party who fails to make a showing
24 sufficient to establish the existence of an element essential to that party’s case, and on
25 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “Of
26 course, a party seeking summary judgment always bears the initial responsibility of

1 informing the district court of the basis for its motion, and identifying those portions of 'the
2 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
3 affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material
4 fact." *Id.*, at 323. As such, when the non-moving party bears the initial burden of proving,
5 at trial, the claim or defense that the motion for summary judgment places in issue, the
6 moving party can meet its initial burden on summary judgment "by 'showing'—that is,
7 pointing out to the district court—that there is an absence of evidence to support the
8 nonmoving party's case." *Id.*, at 325. Conversely, when the burden of proof at trial rests
9 on the party moving for summary judgment, then in moving for summary judgment the
10 party must establish each element of its case.

11 Once the moving party meets its initial burden on summary judgment, the non-
12 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro.
13 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir.
14 2000). As summary judgment allows a court "to isolate and dispose of factually
15 unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the
16 evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H.*
17 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,
18 will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co.*
19 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot
20 "rest upon the mere allegations or denials of [its] pleading' but must instead produce
21 evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'"
22 *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed.
23 R. Civ. Pro. 56(e)).

24 Tisdale is proceeding in *proper person*. As such, the Court considers his papers
25 pursuant to less stringent standards than is otherwise afforded papers drafted by lawyers.
26 Nevertheless, even though Tisdale is representing himself, such status does not eliminate

1 the rules and procedures by which he may prosecute his claims, and pursuant to which the
2 defendants may defend against those claims. To prosecute his claims, Tisdale must file a
3 complaint that (among other things) provides, for each claim, a short and plain statement of
4 the claim showing that he is entitled to relief. See Fed. R. Civ. Proc. 8(a)(2). Before being
5 required to file an answer to the complaint, the defendants are permitted to seek a
6 determination from the Court whether Tisdale has met this requirement. Rule 12(a), (b)(6).
7 In seeking such a determination, the defendants do not have a duty or obligation to
8 produce any evidence. Rather, such a motion considers whether the facts that the plaintiff
9 has stated in his complaint show he would be entitled to relief.

10 While Tisdale may move for summary judgment at any time pursuant to Rule 56,
11 such a motion is necessarily premature where, as here, the defendants have moved to
12 dismiss the complaint and have not had any opportunity to engage in discovery. That
13 Tisdale's motions for judgment are premature is particularly true in this case, as a review of
14 his complaint reveals that he has not stated facts upon which he can obtain the relief he
15 seeks.

16 For example, construing Tisdale's complaint broadly, he has asserted that Bank of
17 America violated the Truth in Lending Act. In seeking to dismiss this claim, the defendants
18 identify three defects in Tisdale's statement of this claim as to Bank of America.¹ First,
19 while Tisdale generally asserts a violation of Regulation Z of TILA, he does not identify the
20 section of Regulation Z that he believes Bank of America violated.

21 Second, the defendants point out that, in these circumstances, TILA does not
22 provide for a claim against a loan servicer unless the servicer is or was an owner of the
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24 ¹ The defendants point out that, as it concerns the TILA claim, Tisdale does
25 not state any facts that concern Bayview. To the extent that Tisdale asserted a TILA claim
26 against Bayview, he has not stated any facts in his complaint upon which he can obtain
relief against Bayview for alleging violating TILA. Accordingly, dismissal of Tisdale's TILA
claim against Bayview is appropriate.

1 underlying obligation. Stated otherwise, to state a TILA claim against Bank of America as
2 a loan servicer, Tisdale had the burden of asserting, in his complaint, that Bank of America
3 is or was the owner of the loan.² The defendants point out that Tisdale has not made any
4 such allegation in his complaint. In opposing the motion, Tisdale neither argues (a) that
5 Bank of America is incorrect in its argument that he has the burden of alleging that Bank of
6 America is or was the owner of the loan; or (b) that he has alleged Bank of America is or
7 was the owner of the debt.

8 Third, the defendants point out that a TILA claim for damages under §1640 must be
9 brought within one year (the limitations period) from the date of the consummation of the
10 transaction. They correctly note that the start of this limitations period can be suspended
11 or tolled, in some circumstances, until the borrower discovers or had a reasonable
12 opportunity to discover the underlying basis for the TILA claim. As noted by the
13 defendants, the underlying lending transaction occurred in August of 2007, suggesting that
14 the one-year limitations period expired in August 2008, more than five years before Tisdale
15 filed the present complaint. Again, Tisdale does not suggest that the defendants are
16 incorrect in arguing that he is seeking damages under §1640, or that they are incorrect that
17 such a claim for damages must be brought within one year. Further, Tisdale does not
18 dispute that the underlying lending transaction occurred more than six years before he
19 brought this suit. Finally, the Court must note the lack of any argument from Tisdale
20 suggesting that he brought his TILA claim for damages within the one-year limitations.
21 Accordingly, for each of the above noted reasons, Tisdale's current complaint lacks the
22 required short and plain statement alleging facts upon which he is entitled to relief for a
23 TILA claim that can be maintained against the defendants.

24
25 ² The Court would remind Tisdale that, pursuant to Rule 11, he can only make
26 such a factual contention in his complaint if, to the best of his knowledge, information and
belief, the factual contention is supported by evidence or is likely to be supported by
evidence after a reasonable opportunity for further investigation or discovery.

1 The Court would note that a similar analysis applies to each of the possible claims
 2 for relief that the defendants have identified in their motion to dismiss. Assuming Tisdale
 3 has intended to state each of those claims for relief (as identified by the defendants), the
 4 defendants have shown for each claim a deficiency or a number of deficiencies. For each
 5 of those claims, and each of the identified deficiencies or defects, Tisdale's opposition
 6 neither suggests that the defendants' legal analysis is incorrect nor that the defendants'
 7 analysis of his complaint's deficiencies regarding the required factual allegations is
 8 incorrect as to any of the potential claims for relief.

9 Accordingly, the Court must dismiss the complaint. However, the Court will do so
 10 without prejudice, and provide Tisdale an opportunity to amend his complaint to correct its
 11 deficiencies. If Tisdale fails to timely amend his complaint, or amends his complaint
 12 without correcting the noted deficiencies, the Court may dismiss Tisdale's claims with
 13 prejudice.

14 Therefore, for good cause shown,


15 THE COURT **ORDERS** that Defendants' Motion to Dismiss (#5) is GRANTED;

16 THE COURT FURTHER **ORDERS** that this matter is DISMISSED without prejudice;

17 THE COURT FURTHER **ORDERS** that Plaintiff may amend his complaint not later
 18 than 21 days after the date this Order is Entered; If the Plaintiff fails to timely amend his
 19 complaint, the Court will dismiss this action with prejudice;

20 THE COURT FURTHER **ORDERS** that the Plaintiff's Motions for Judgment (## 11,
 21 13) are DENIED as moot.

22
 23 DATED this 2 day of April, 2014.

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 25 
 26 Lloyd D. George
 United States District Judge